

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

Fond Du Lac Bumper Exchange, Inc., on
behalf of itself and others similarly situated,

Plaintiff,

vs.

Jui Li Enterprise Company, Ltd., et al.,

Defendants.

CASE NO. 2:09-CV-00852-LA

Vehimax International, LLC, on behalf of
itself and others similarly situated,

Plaintiff,

vs.

Jui Li Enterprise Company, Ltd., et al.,

Defendants.

CASE NO. 2:10-CV-00224-LA

**DEFENDANTS' JOINT MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED
AND MOTION FOR JUDGMENT ON THE PLEADINGS**

Defendants Auto Parts Industrial, Ltd., TYG Products, LP, Cornerstone Auto Parts, LLC, Gordon Auto Body Parts, and TKY Industrial Co. Ltd. (collectively, the "Defendants"), by and through their respective attorneys, move to dismiss First Amended Complaint ("FAC") of Fond Du Lac Bumper Exchange, Inc. and Vehimax International, LLC (collectively, "Plaintiffs"), pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(c). In support of the foregoing motion, Defendants state as follows:

1. The allegations in the First Amended Complaint fail adequately to set forth direct evidence of the alleged conspiracy, allegedly in violation of Section 1 of the Sherman Act, 15

U.S.C. §1, as required by Rules 8 and 12 of the Federal Rules of Civil Procedure, and the standards set forth by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

2. Plaintiffs have also failed to plead facts sufficient to permit the Court to infer the existence of a conspiracy in violation of Section 1.

3. Plaintiffs' claims based upon sales prior to September 3, 2005 are barred by the applicable statute of limitations, 15 U.S.C. §15b.

WHEREFORE, Defendants respectfully request:

A. That the Court dismiss the First Amended Complaint in its entirety, pursuant to Fed. R. Civ. P. 12(b)(6) and 12(c); and

B. In the alternative, to the extent that the Court does not dismiss the First Amended Complaint in its entirety, that the Court dismiss all claims based on sales prior to September 3, 2005.¹

¹ Defendants have also submitted a Motion to Dismiss for Lack of Subject Matter Jurisdiction, pursuant to the Foreign Trade Antitrust Improvements Act (the "FTAIA"), 15 U.S.C. § 6a. This filing order was necessitated by Fed. R. Civ. P. 12(g)(2). Defendants submit, however, that the Motion to Dismiss for Lack of Subject Matter Jurisdiction should be decided first, as it raises a fundamental threshold issue regarding the Court's subject matter jurisdiction. Should the Court agree that Plaintiffs have not satisfied their burden of establishing subject matter jurisdiction, the Court need not consider this Motion, which demonstrates that the First Amended Complaint fails to state an antitrust claim. Courts have generally considered challenges to subject matter jurisdiction, pursuant to the FTAIA, prior to considering the merits of antitrust claims. See, e.g., *Animal Science Products, Inc. v. China National Metals & Minerals Import and Export Corporation*, 2010 WL 1324918, at *33 (D.N.J. April 1, 2010) (*Animal Science II*) (Exh. G to Motion to Dismiss for Lack of Subject Matter Jurisdiction) ("[T]he Sherman Act test would be addressed only if subject matter jurisdiction over this matter is established.").

Respectfully submitted,

Date: May 11, 2010

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